IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-000025
[2014] NZHC 1681

BETWEEN	DANONE ASIA PACIFIC HOLDINGS PTE LTD First Plaintiff
	NUTRICIA LIMITED Second Plaintiff
	DUMEX BABY FOODS CO LTD Third Plaintiff
	DANONE DUMEX (MALAYSIA) SDN BHD Fourth Plaintiff
	DUMEX LTD Fifth Plaintiff
	DANONE VIETNAM COMPANY LIMITED Sixth Plaintiff
	DANONE NUTRICIA EARLY LIFE NUTRITION (HONG KONG) LIMITED Seventh Plaintiff
	NUTRICIA AUSTRALIA PTY LIMITED Eighth Plaintiff
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Defendant

Hearing: 23 June 2014

Appearances: A R Galbraith QC and D R Kalderimis for Applicant/Defendant
D Goddard QC and J H Stevens for Respondent/Plaintiffs

Judgment: 17 July 2014

JUDGMENT OF VENNING J

This judgment was delivered by me on 17 July 2014 at 5.00 pm, pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar
Date..........

Solicitors: Chapman Tripp, Auckland
Bell Gully, Auckland
Copy to: A R Galbraith QC, Auckland
D Goddard QC, Wellington

Application

[1] Fonterra Co-Operative Group Limited (FCGL) seeks an order staying this proceeding until further order of the Court, together with associated orders.

Factual background

[2] The first plaintiff, Danone Asia Pacific Holdings Pte Ltd (Danone AP), manufactures and supplies baby nutritional products (baby formula). On 1 January 2011 Fonterra Limited (Fonterra) and Danone AP entered a supply agreement (supply agreement) pursuant to which Fonterra agreed to supply dairy derived nutritional base powder products (product) to Danone AP for use in its baby formula.

[3] On 2 February 2012 a foreign matter contamination occurred at Fonterra's Hautapu plant during the manufacture of whey protein concentrate (80 per cent) (WPC80), a nutritional food product used in a variety of consumable end products, including baby formula.

[4] On 20 February 2012 Hautapu sent a product disposal request relating to the WPC80 to the regulatory authority Asure Quality. Asure Quality declined the initial request. Hautapu then sent a revised request to Asure Quality. It sought approval to wet rework the WPC80 or, if required, to dispose of it as stock food. Asure Quality approved Hautapu's revised product disposal request on 11 April 2012. The rework plan did not address necessary cleaning procedures for the piping used in the process. Between 17 March 2012 and 22 May 2012 Hautapu reworked the product (the affected WPC80).

[5] Hautapu sent 13.5 tonnes of the affected WPC80 to Altona, Victoria for use by Fonterra Australia Pty Ltd (Fonterra Australia) in the production of product for Fonterra to supply to Danone AP.

[6] Between 1 March 2013 and 18 March 2013 Fonterra Australia manufactured product using the affected WPC80.

[7] On 18 March 2013 testing carried out as part of the product manufacturing at Fonterra Australia showed elevated sulphite reducing clostridia (SRC) levels for some of the final product. Fonterra Australia began investigating the elevated SRC levels.

[8] Between 27 March 2013 and 3 April 2013 the testing and trace back confirmed that the affected WPC80 was the likely cause of the elevated SRC levels. Between 11 and 15 April 2013 Fonterra Research and Development Centre (FRDC) tested the SRC levels in the affected WPC80 to establish whether or not the organisms were clostridium perfringens. Under the supply agreement Danone AP had a specification requirement that the product be tested for clostridium perfringens when high SRC levels were present. FRDC confirmed that the affected WPC80 contained clostridia sporogenes and bacillus licheniformis.

[9] Fonterra and Danone AP had a conference call on 23 April to discuss the issue and a report Fonterra had prepared on 22 April. In that call and in other communications between then and 7 May, the parties sought to address the issues raised by the elevated SRC levels in the product. Fonterra sought Danone AP's agreement to accept product that did not meet the specification. Danone AP advised that, save for 12.6MT of product to be used for growing up milk powder, it would not accept out of specification product but would accept product within specification even if it contained elevated SRC levels.

[10] On 7 May 2013 Fonterra Australia downgraded the out of specification product not accepted by Danone AP to stock food.

[11] On 20 June 2013 the Waitoa plant owned and operated by Fonterra (Waitoa), which produced nutritional products for other customers (but not for Danone AP), was alerted to the possibility of elevated SRC levels in its product. Waitoa had also received deliveries of the affected WPC80. Testing of the Waitoa product confirmed elevated SRC levels.

[12] On 19 July 2013 initial testing by AgResearch indicated that SRC levels within the affected WPC80 were more comparable with clostridium botulinium than

with clostridium sporogenes. A mouse bioassay was required to confirm the absence or presence of clostridium botulinium.

[13] On 26 July 2013 the product containing the affected WPC80 in Fonterra's control was put on hold. By 30 July 2013 AgResearch mouse bioassay testing showed some toxic effects but with results to be confirmed. On 31 July 2013 the AgResearch mouse bioassay testing showed a strongly positive result for toxin (a mouse died).

[14] On 1 August 2013 Fonterra began contacting customers, including Danone AP, that it believed had been sent product containing the affected WPC80. At 9.53 am on 2 August 2013 Fonterra communicated with Danone AP. It provided written details of the affected product and requested a meeting to discuss. Shortly after that, at 11.29 am, a preliminary report from AgResearch confirmed that all samples were shown to be toxigenic with isolates likely to be clostridium botulinum. Between 2 August and 18 August Fonterra provided Danone AP with updated data for the product containing the affected WPC80.

[15] In light of the information, Danone AP and the other plaintiffs pursued a comprehensive recall of potentially affected baby formula.

[16] Finally, on 31 August 2013, the Ministry for Primary Industries released a report detailing the full diagnostic results of further testing conducted in both New Zealand and the United States concerning the affected WPC80. The results were all negative for clostridium botulinium. The organism was confirmed as clostridium sporogenes.

The supply agreement

[17] The supply agreement between Fonterra and Danone AP contains an arbitration clause. The parties agreed to an arbitration in accordance with UNCITRAL Arbitration Rules. The number of arbitrators is to be one if agreed by the parties but, failing such agreement, three. The place of arbitration is Singapore. The arbitration is to be governed by the laws of England.

[18] The supply agreement also included provisions dealing with general and specific limitations of liability:

> 14.3 **Liability limited**: Fonterra shall have no liability to Danone and Danone shall have no liability to Fonterra for anything, other than a breach by Fonterra or by Danone, as the case may be, of an express provision of this agreement (including but not limited to negligence on the part of Fonterra or Danone).

[19] Clause 14.5(a) provided that Fonterra's liability to Danone AP was not to exceed the amount of AUD$10,000,000 per claim or series of related claims. Fonterra's total liability to Danone AP for claims under or in connection with the agreement in any one year was not to exceed AUD$30,000,000 per annum.

[20] By notice of arbitration dated 8 January 2014 Danone AP, together with the second to eighth plaintiffs, gave notice of a dispute with Fonterra and Fonterra Australia. The notice raised claims both in contract, for breach of material provisions of the supply agreement, and in tort.[1]

[21] On 10 February 2014 Fonterra filed a response to the notice of arbitration. Inter alia, Fonterra noted that neither Fonterra Australia nor the second to eighth plaintiffs were parties to the supply agreement. It submitted that the arbitral tribunal lacked jurisdiction to determine any claim advanced against Fonterra Australia and by the second to eighth plaintiffs.

[22] The parties have each appointed arbitrators. The third arbitrator has not been confirmed as the parties approached to date have not been able to accept appointment.

These proceedings

[23] On 9 January 2014 Danone AP and the second to eighth plaintiffs (collectively the Danone AP plaintiffs) issued the claim in this Court against FCGL.

[24] The Danone AP plaintiffs raise four causes of action:

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1 Notice of Arbitration at 37.

(a) breach of s 9 Fair Trading Act 1986 (FTA);

(b) breach of s 13 FTA;

(c) negligent misstatement;

(d) product liability in relation to the affected WPC80.

FCGL's case

[25] As noted, FCGL seeks an order staying this proceeding until further order of the Court, at least until final determination of the arbitration commenced by the plaintiffs in Singapore.

[26] FCGL argues the relationship at the heart of the dispute is that of supplier and customer which is provided for by the supply agreement between Fonterra and Danone AP. All dealings between Danone AP and Fonterra were governed by the terms of the supply agreement. The plaintiffs' tortious and statutory claims in these proceedings derive from the supply agreement and could, and should be, asserted in the Singapore arbitration where they can be considered in their proper contractual context instead of being determined in isolation by this Court.

[27] FCGL submits the current proceedings are a contrivance brought to embarrass FCGL and to seek to evade the negotiated limitations on liability contained within the supply agreement.

[28] FCGL argues the stay is also justified on pragmatic grounds, namely that the same documents, witnesses and evidential inquiries will be involved in the arbitration and in these proceedings. It would be a significant and unnecessary strain on both parties to be required to litigate the same matters simultaneously in two fora. Without a stay there is also a risk of inconsistent factual and legal findings.

[29] FCGL says that to the extent there is any independent merit in the particular claims that cannot properly be dealt with within the arbitration (without conceding

there would be any), the claims can be pursued once the arbitration has been concluded and in light of the findings in that arbitration.

Danone's response

[30] The Danone plaintiffs argue that the Court should not exercise its discretion under r 15.1 or its inherent jurisdiction to direct a stay. A mandatory stay is not available and in these circumstances a stay should only be allowed in rare and compelling circumstances. Their claims against FCGL are genuine and they have a right of access to justice in order to have their claims heard and determined by the Court.

[31] The Danone plaintiffs further argue that it is incorrect for FCGL to say it was only Fonterra that took actions and decisions relevant to the Danone plaintiffs in the course of the crisis which caused them loss and harm. The employees whose actions are in issue are employed by FCGL. FRDC, which tested the SRC levels in the affected WPC80, is an FCGL scientific unit. Fundamentally, even if similar statutory claims to those advanced in this claim against FCGL were brought by Danone AP in the arbitration the arbitrators could not determine the liability of FCGL as it is not a party to that arbitration.

[32] The Danone plaintiffs also say it is too early to determine whether an issue estoppel will in fact arise and further, it is incorrect to assert, as FCGL does, that this proceeding will not traverse factual territory beyond the scope of the Singapore arbitration. The causes of action are not co-extensive. The conduct relied on will not be exactly the same.

Jurisdiction

[33] Article 8(1), Schedule 1 of the Arbitration Act 1996 does not apply. There is no arbitration agreement between the Danone plaintiffs and FCGL. However, the Court has a discretionary power to stay proceedings. The power is confirmed by

r 15.1(3). The Court also retains an inherent jurisdiction to stay which is unaffected by r 15.1:[2]

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
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> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
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> (4) This rule does not affect the court's inherent jurisdiction.

[34] The discretionary power under r 15.1(3) to stay instead of striking out must be informed by the considerations in r 15.1(1). With perhaps the exception of the fourth cause of action FCGL does not at present suggest the Danone plaintiffs' claims should be stayed as disclosing no reasonably arguable cause of action. FCGL says the fourth cause of action is based on a fundamentally incorrect premise, namely that FCGL manufactured the WPC80 at Hautapu. Fonterra owns and operates the plant at Hautapu, not FCGL. But as Mr Galbraith QC accepted, to the extent that FCGL says there is no basis for the fourth cause of action against FCGL, the appropriate course would be to apply to strike out rather than stay.

[35] The grounds in r 15.1(1)(b)–(d) concern the misuse of the Court's processes.[3] It cannot be said Danone plaintiffs' pleading will cause prejudice or delay in the sense that r 15.1(b) contemplates. The pleadings, whilst extensive, are not prolix.

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2 High Court Rules, r 15.1(4); and *Forestry Corporation of NZ v Attorney-General* (1999) 16 PRNZ 262, 269.

3 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

They are neither scandalous nor irrelevant. Nor will they, on the Danone plaintiffs' case, delay the arbitration.

[36] On the basis of the evidence before the Court at present the key representations made by or on behalf of Fonterra were made by people employed by FCGL. For present purposes it is at least arguable that the actions relied on to support the tortious and statutory claims are properly attributable to FCGL as it employed the people who carried out the actions. If FCGL is a proper defendant to the claims in that sense then these proceedings cannot be categorised as frivolous or vexatious. It cannot be said that such proceedings trifle with the Court's process or are improper in the sense contemplated by r 15.1(3).

[37] If r 15.1(3) applies, it must be on the basis the proceedings are otherwise an abuse of process under r 15.1(d). Abuse of process in this context is not limited to the rather narrow tort of abuse of process but can apply to proceedings which, although not inconsistent with the literal application of procedural rules, are nevertheless "manifestly" or "seriously" unfair to a party.[4] It will, for example, be an abuse of process to issue duplicate proceedings involving the same parties.[5]

[38] While FCGL does not go so far as to expressly say the current proceedings are not brought in good faith, that is the tenor of its submission. It says the claim is a contrivance. In this context the importance of a party's fundamental right to access the Court is relevant. The starting point must be that a plaintiff, such as the Danone plaintiffs, is entitled to sue who he or she wishes to sue so long as the claim is bona fide and is of substance.[6]

[39] Since Danone's claim is on its face bona fide, it follows that this Court should permit it to proceed unless a stay can otherwise be justified. For the reasons that follow I am satisfied that this Court has jurisdiction either under r 15.1(d) or the inherent jurisdiction of the Court to stay proceedings in these circumstances, but that

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4 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] NZLR 91 at [31]–[32], citing *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, [2009] 239 CLR 75 at [27].

5 *Otis Elevator Co Ltd v Linnel Builders Ltd* (1991) 5 PRNZ 72 (HC), and *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 (Ch).

6 *Abraham v Thompson* [1997] 4 All ER 362 at 374.

decision should only be made in rare and compelling circumstances where the costs, convenience and the interests of justice (including consideration of the Danone plaintiffs' right to access the Court) weigh in favour of a stay.

Abuse of process/inherent jurisdiction

[40] Mr Galbraith submitted that, where a plaintiff commences proceedings against multiple defendants, some of whom are contractual counterparties bound by art 8 but others are not, the Court may direct the contractual counterparties to arbitration and order or direct a general stay of the Court proceedings involving the other parties. It does so to avoid an abuse of process arising from a duplication of proceedings.[7]

[41] The cases referred to as examples of where the Court has directed a stay on that basis are, however, distinguishable to the present one. In *On Line International Ltd*, for example, the plaintiff (On Line International Ltd (OLIL)) and the defendant (On Line Ltd (OLL)) were parties to an arbitration agreement. Mr Hong, the second plaintiff, and Mr Kay, the second defendant, were not. The Court acknowledged that, as recognised in *Kaverit Steel & Crane Ltd v Kone Corp*, where the claim by Mr Hong was truly derivative on the claim by OLIL a stay of proceedings could be ordered.[8] The Court was satisfied that the claims between Mr Hong and OLL and Mr Kay were so closely connected with the claims in the arbitration between OLIL and OLL that the Court should stay the proceedings by Mr Hong pending the outcome of the arbitration. While Mr Hong and Mr Kay could not be required to go to arbitration, the Court stayed the aspect of the proceedings involving them pending the result of the arbitration between OLIL and OLL.

[42] In *Montgomery Watson NZ Ltd v Milburn NZ Ltd & Ors*, Montgomery Watson and Aquatec-McDow were parties to an arbitration agreement. Montgomery Watson issued proceedings against four defendants, including Aquatec-McDow. William Young J considered that if Montgomery Watson was permitted to pursue its

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7 *On Line International Limited & Anor v On Line Ltd & Anor* HC Christchurch CP2/00, 11 April 2000; *Montgomery Watson NZ Ltd v Milburn NZ Ltd & Ors* HC Christchurch CP86/00, 9 October 2000; and *Kaverit Steel et al & Crane Ltd v Kone Corp et al* (1992) 87 DLR (4th) 129 (ABCA).

8 *On Line International Limited & Anor v On Line Ltd & Anor*, above n 7 at [47].

claims against the first three defendants those defendants could be expected to join Aquatec-McDow with the result the proceedings would effectively run in parallel with the arbitration agreement. He considered that that would permit the process of the Court to subvert the arbitration agreement between Aquatec-McDow and Montgomery Watson.[9] The Judge stayed the proceedings.

[43] To similar effect is the Victorian case of *Amcor Packaging Australia Pty Ltd v Baulderstone*.[10]

[44] In the above cases at least one of the plaintiffs and one of the defendants in the proceedings before the Court were parties to an arbitration agreement. That is not the case with the present proceedings.

[45] The case of *Reichhold Norway v Goldman Sachs International*[11] is perhaps most relevant to the present situation in that, like the present case the defendant seeking the stay was not a party to the arbitration agreement. Goldman Sachs had been engaged as agents by a Norwegian company J, to advise and negotiate the sale of one of J's subsidiary companies, P. J agreed to indemnify Goldman Sachs against consequential liability. Goldman Sachs supplied confidential business information about P to the second plaintiff. Goldman Sachs did not disclose a report forwarded to them by J which showed a significant decrease in P's profitability. Under the agreement for sale J gave warranties as to the accuracy of P's accounts. The plaintiffs' remedy for any breach by J was limited to damages and any dispute was to be resolved by arbitration in Norway. The plaintiffs gave notice to J of a claim under the agreement and subsequently commenced arbitration proceedings in Norway. They also began an action in England against Goldman Sachs claiming damages for negligent misstatement.

[46] Although Goldman Sachs was not a party to the arbitration agreement it sought a stay of the proceedings against it pending the outcome of the arbitration in

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9 *Montgomery Watson NZ Ltd v Milburn NZ Ltd & Ors*, above n 7 at [33], citing *Contact Energy Ltd v Natural Gas Corporation Ltd* CA65/00, 18 July 2000. See also *Cowley v Shortland Publications Ltd* (1991) 5 PRNZ 76 (HC).

10 *Amcor Packaging Australia Pty Ltd v Baulderstone* [2013] FCA 253.

11 *Reichhold Norway ASA & Anor v Goldman Sachs International* [2000] 1 WLR 173, [2000] 2 All ER 679 (EWCA Civ).

Norway. Moore-Bick J considered that the plaintiffs' right to sue a defendant of their choice was subject to the Court's power to control the conduct of litigation before it. Having regard to the commercial relationships arising from the agreements between the plaintiffs, J and the defendants, the Judge concluded that the cost, convenience and the interests of justice weighed in favour of the stay sought. He directed a stay in the exercise of the inherent jurisdiction of the Court. The plaintiffs' appeal was dismissed.

[47] In the course of delivering the judgment of the Court of Appeal Lord Bingham recorded the plaintiff's argument (which in part reflects the first argument Mr Goddard QC raised for Danone):[12]

> Mr Carr submitted that the judge's order violated a fundamental principle that a plaintiff making a bona fide claim, not tainted with abuse, oppression or any vexatious quality, may sue in the English court any defendant over whom the court has jurisdiction. He submitted that the court has no role to decide whom a plaintiff may or may not sue here or, as he put it, a plaintiff does not have to obtain a passport from the court to sue a defendant in this country over whom the court has jurisdiction.

[48] The plaintiff further submitted that to grant a stay may risk a flood of applications inviting the Court to adjudicate on matters which may be barely justiciable. In doing so the Court would provide a charter for evasive and manipulative defendants, introduce uncertainty into Court processes and possibly infringe art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[49] While acknowledging those arguments, Lord Bingham confirmed the Court had jurisdiction to stay the proceedings in rare and compelling circumstances:[13]

> … I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances. Should the upholding of the judge's order lead to the making of unmeritorious applications, then I am confident that judges will know how to react.

[50] It appears the stay was granted in the exercise of the Court's inherent jurisdiction. In *AKJ v Commissioner of Police*, the England and Wales Court of

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12 At 183.
13 At 186.

Appeal also confirmed the jurisdiction for a stay in accordance with the case management rules but in doing so noted that such a stay would be granted only where the party seeking the stay can point to a real risk of injustice.[14]

[51] *Reichhold Norway* was applied in *ET Plus SA v Welter*.[15] Gross J stayed the claims not within the scope of the arbitration agreement as a matter of case management. In that case, however, the Judge was not required to consider the appropriate test as there was no serious dispute that the surviving claims should be stayed pending the outcome of the arbitration.[16]

[52] *Reichhold Norway* was also applied by the English and Wales Court of Appeal in *Racy v Hawila* where, in dismissing an appeal from a judgment in which the Judge had ruled the appellant had to elect which of two proceedings he was to pursue, the court noted that it would be "oppressive" to require Mr Hawila to have to face both actions simultaneously.[17]

[53] I also note that in *Carter Holt Harvey Ltd v Genesis Power Ltd* Randerson J accepted, obiter, that in a case where there was a substantial degree of overlap of factors or legal issues between the arbitration and Court proceedings it could be "inappropriate" for both to proceed simultaneously even if the matters in the Court proceedings were not the subject of the arbitration.[18]

Conclusion - jurisdiction

[54] In conclusion on this point I accept that even where the parties to the proceeding are not both parties to the arbitration (as is the case here), the Court retains jurisdiction to stay the proceedings either under r 15.1(3) or its inherent jurisdiction including for reasons of sensible case management. Parties do not enjoy an unfettered right to access to the Courts; rather, the Court is entitled to impose

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14 *AKJ v Commissioner of Police* [2013] EWCA Civ 1342, [2014] 1 WLR 285 at [50]. See also The White Book Service 2014 *Civil Procedure: Volume 1* (Sweet & Maxwell, London) at [CPR3.1.7].

15 *ET Plus SA v Welter* [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep 251.

16 At [91].

17 *Racy v Hawila* [2004] EWCA Civ 209 at [64].

18 *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] NZLR 794 (HC) at [61].

procedures that are appropriate in the circumstances having regard to the nature and content of the litigation as a whole.[19]

[55] The jurisdiction to do so, however, should only be exercised in rare and compelling circumstances.[20] There must be a real risk of unfairness or oppression to the defendant if the proceedings were allowed to continue. Considerations of cost, convenience and the interests of justice must weigh in favour of a stay.[21] The onus is on the applicant to satisfy the Court that such circumstances exist.[22]

Discussion

[56] In determining whether such circumstances exist in the present case it is necessary to consider in more detail the relationship between the parties to the proceeding and the arbitration and, in particular, the claims in the arbitration and proceedings and the issues they raise, together with other relevant factors such as issue estoppel, the risk of inconsistent findings, delay and cost.

[57] In doing so, I take into account the evidence before the Court by way of the affidavits filed.[23] While a strike out proceeds on the basis of the pleadings, I consider that it is open to the Court to take into account such evidence on a stay application such as the present. While the Court will not attempt to resolve genuine conflicts in affidavit evidence, it is entitled to take into account relevant evidence. In the present case a significant amount of the evidence is not directly in issue. There is also uncontroverted documentary evidence.

The relationship between the parties to this proceeding and the parties to the arbitration

[58] On first impression, Fonterra's position on this aspect of the matter appears contradictory. While FCGL argues the relationship at the heart of the dispute is

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19 *Goldman Sachs International v Reichhold Norway ASA and Anor* [1999] 1 All ER 40 (Comm) at 47, cited in *Reichhold Norway ASA & Anor v Goldman Sachs International*, above n 11 at 179.

20 *Reichhold Norway ASA & Anor v Goldman Sachs International*, above n 11 at 186.

21 *Goldman Sachs International v Reichhold Norway ASA and Anor*, above n 19 at 51-52.

22 *AKJ v Commissioner of Police*, above n 14 at [51].

23 The three affidavits of Andrew John Cordner for FCGL; the affidavits of Nadine Kuester, Suwimol Soontaranunta and Grace Margaret Boos for Danone; and the affidavits in reply of Anna Catherine Smith and Christine Mary Ashford.

found in the supply contract so that all claims should be resolved in the arbitration, the Fonterra interests also rely on the strict contractual relationship between Danone AP and Fonterra to limit the parties to the arbitration. In its response to Danone AP's claim in the arbitration, Fonterra takes the point that only Danone AP is a party to the arbitration clause in the supply agreement. Fonterra says the claims purported to be pursued by the second to eighth plaintiffs in this proceeding cannot be pursued in the arbitration proceedings, and nor can the proposed claim against Fonterra Australia.

[59] If Fonterra's argument on that point succeeds in the arbitration then the second to eighth plaintiffs at least would not be able to pursue any claims against Fonterra in the arbitration. If these proceedings are stayed then the second to eighth plaintiffs would not be able to pursue their claims either in the arbitration or against FCGL, at least until the arbitration between Danone AP and Fonterra was completed.

[60] Fonterra's response is that, if Danone AP fails in its claim at arbitration against Fonterra, then the likelihood of the second to eighth plaintiffs succeeding against FCGL must be remote. On the other hand, if Danone AP were to succeed at arbitration, that would "most likely as a practical matter … resolve the essential disputes between the parties".

[61] I accept the force of that argument. The second to eighth plaintiffs' claims against FCGL add little to Danone AP's claims. They mirror the Danone AP claims. The Danone plaintiffs' claims in these proceedings are effectively derivative from, and subsidiary to, the contractual claims Danone AP has against Fonterra. The defective product supplied to and used by the second to eighth plaintiffs was supplied by Fonterra under its supply agreement with Danone AP. The losses claimed by the Danone plaintiffs in these proceedings arise as a consequence of the supply of the affected WPC80 and the recall of the baby formula manufactured using it. The supply agreement provided for the consequences of its breach, including costs on recall.[24]

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[24] Supply agreement, cl 9.

The claims in the arbitration and these proceedings

[62] In the background to the claims in the arbitration the Danone claimants allege:

(a) Fonterra and Fonterra Australia knew or came to know that the product supplied to the Danone claimants was contaminated by the affected WPC80.

(b) Despite being advised by its own food assurance team that the affected WPC80 should be subjected to further testing, Fonterra and Fonterra Australia did not conduct a risk assessment nor trace or quarantine the affected WPC80 pending further testing and did not disclose the relevant circumstances to Danone AP.

(c) To the contrary, Fonterra affirmatively represented that the product supplied to the Danone claimants presented no risk from a food safety perspective and fully complied with Danone AP's product specifications.

(d) Fonterra and Fonterra Australia's representations were not true at the time they were made.

(e) The Danone claimants relied on those representations.

(f) When FCGL announced that it had (unknown to the Danone claimants) been testing the affected WPC80 and disclosed the results, the Danone claimants were required to publicly recall all products containing the WPC80.

(g) The liability cap does not apply to the recall-related costs and does not apply to Fonterra's conscious and deceptive conduct.

(h) The conduct constituted a Fonterra fault under the terms of the supply agreement entitling Danone AP to terminate the agreement.

[63] The contractual claim alleges Fonterra's conduct breached the following provisions of the supply agreement:

(a) that Fonterra would comply with contract specifications for the product supplied to Danone AP;[25]

(b) that the base powder would comply with all conditions, requirements, and limitations imposed by licences, approvals and registrations necessary for it to manufacture and supply the product;[26]

(c) that Fonterra would not make any alteration in the composition or to the characteristics or production methods of the products without Danone AP's written consent;[27]

(d) that all products supplied would comply with specifications at the time of delivery and with all laws, regulations and standards of the country of origin and be fit for consumption by infants;[28] and

(e) that Fonterra would notify Danone AP of the existence of any quality issue relating to the manufacture of the product and work with Danone AP in good faith to resolve such issues.[29]

[64] The claims in tort allege Fonterra and Fonterra Australia supplied the Danone claimants with product they knew:

(a) contained unsuitable ingredients;

(b) was materially non-compliant with Danone AP's specifications; and

(c) should have been traced and quarantined from the supply chain pending further testing.

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25 Supply Agreement, cl 5.1.
26 Clause 5.6.
27 Clause 7.3.
28 Clause 7.5(a), (b) and (c).
29 Clause 8.4.

[65] The Danone claimants also allege that Fonterra falsely represented the product was safe and complaint and failed to correct that representation.

[66] They further allege that Fonterra and Fonterra Australia breached the duty of care owed to them:

(a) not to supply product which they knew to be unsuitable for use pending further testing;

(b) not to make false representations about the suitability or safety of such products and its conformity to specifications; and/or

(c) to correct such representations when they subsequently became aware they were false.

[67] The relief sought includes damages for the costs of recall, loss of profits, and loss of business and reputation.

The current proceedings

[68] The claim in these proceedings pleads the general background set out at [3] to [15] hereof (although in far more detail). Although the claim does not refer to the supply agreement, it pleads at 33:

> … Purchase orders were then placed with [Fonterra] for the Products, and at all material times the Products were shipped by [Fonterra] to the plaintiffs' manufacturing sites in New Zealand, China, Malaysia and Thailand.

That is a direct reference to supply in accordance with the supply agreement between Danone AP and Fonterra. It is that product that contained the affected WPC80 which ultimately led to the need for the Danone claimants to recall its products resulting in the consequential losses it claims. It is of note that the Danone plaintiffs in the New Zealand proceeding allege losses of projected costs impact of €280 million and lost

sales of €350 million,[30] which are exactly the same as the amounts claimed in the arbitration.[31]

[69] The Danone plaintiffs place emphasis on what they refer to as the "April assurances" as supporting the FTA claims. They refer to a key document, namely a 22 April 2013 report (the report) sent to Danone AP by Anna Thomas (now Anna Smith). Ms Thomas corresponded with Danone AP under her FCGL email sign off. There then followed further teleconferences and communications with FCGL's employees during which the Danone plaintiffs say they were given assurances that, in summary, there was no risk from a food safety perspective from the use of the affected WPC80 (the April assurances).

[70] In their first cause of action the Danone plaintiffs say that the report, the 23 April teleconference and the April assurances were in breach of s 9 FTA as misleading and deceptive in a variety of ways, but essentially that FCGL had further relevant information available to it which it did not disclose to the Danone plaintiffs. Those allegations and the factual basis for them are very similar to the allegations made in the arbitration that Fonterra breached cl 8.4 of the supply agreement that it would notify Danone AP of the existence of any quality issue and the tortious claim that Fonterra falsely represented the product was safe and compliant and failed to correct that representation.

[71] It is also relevant that the April assurances were given to Danone AP rather than the Danone plaintiffs as a whole.[32]

[72] In the second cause of action the Danone plaintiffs allege that, in preparing the 22 April 2013 report, providing it to the Danone plaintiffs, participating in the 23 April 2013 telephone conference, giving the April assurances and failing to disclose subsequent relevant information FCGL made false or misleading representations in breach of s 13(a) of the FTA. Again, the conduct in issue is in connection with the supply of the affected WPC80 which was supplied under the supply agreement between Fonterra and Danone AP.

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30 Statement of claim, at 99.
31 Arbitration claim, at 38(b).
32 Statement of claim, at 48.

[73] Amongst other things, the Danone plaintiffs say that if FCGL had not made the false and misleading representations they would have refused to accept the product and would have made a more orderly recall of the baby food. Again, the refusal to accept would have been a refusal to accept product under the supply agreement. The costs related to or associated with the recall of such product are provided for in the supply agreement and form part of the claim in the arbitration.

[74] In the third cause of action the Danone plaintiffs allege that FCGL knew or should have known the Danone plaintiffs were relying on it to provide them with correct information about the safety and fitness for the purpose of the products being supplied to them. They allege that FCGL owed each of them a duty to take reasonable care to ensure that the April assurances were correct and any information necessary in order to qualify, correct or update the April assurances was provided promptly to them. They allege FCGL breached those duties. Of note they plead Danone AP was receiving the April assurances "on its own behalf for and on behalf of the second to eighth plaintiffs". But on the current information before the Court, the product supplied by Fonterra was supplied to Danone AP.

[75] In the fourth and final cause of action the Danone plaintiffs allege that FCGL manufactured the affected WPC80 and that in manufacturing and supplying the WPC80 it owed a duty to end consumers. FCGL knew or ought to have known that some of the affected WPC80 would be ultimately used by the Danone plaintiffs to manufacture and supply baby formula and knew or ought to have known that if the Danone plaintiffs became aware of a defect in the affected WPC80 used in making their baby formula the plaintiffs would take steps to prevent such harm and incur costs in doing so. They allege that the FCGL breached the duty of care owed to the Danone plaintiffs to take reasonable care in manufacturing and supplying WPC80 to ensure that it was free from any defect giving rise to a risk to the health and safety of any consumers and was fit for consumption and that FCGL breached the product duty of care when manufacturing and supplying the defective WPC80.

[76] The Danone plaintiffs say they have all been affected in that they have recalled branded baby formula products in New Zealand, China, Cambodia, Hong Kong and Macau, Malaysia, Singapore, Thailand, Laos, and Vietnam. In other

jurisdictions, including Australia and Myanmar, they took other steps to stop potentially affected baby formula products reaching consumers.

[77] Putting the identity of the defendant to one side for the moment, the facts underlying the claims the Danone plaintiffs bring in these proceedings are essentially the same facts that underlie and will need to be traversed in Danone AP's claim in the arbitration. At the heart of both the arbitration and these proceedings is Danone AP's claim to recover the losses sustained as a result of Fonterra supplying defective product, including the consequential losses associated with recall, and lost sales. In the proceedings the losses are said to have been exacerbated in that further losses flowed from the way FCGL responded to the problem. That claim, however, could be pursued against Fonterra in the arbitration. There is a significant overlap between both the factual basis underlying the claim in the arbitration and this proceeding and also the legal issues that will arise in both.

The scope of the Singaporean arbitration

[78] It follows that I accept there is force in FCGL's argument that the Singaporean arbitration will deal with claims arising out of the supply contract, the associated tortious claims, and could also deal with any associated statutory claims including the present claims under the FTA between Danone AP and FCGL.

[79] The Danone plaintiffs accept that the arbitration can deal with associated tortious claims. In the arbitration statement of claim the Danone claimants allege that Fonterra and Fonterra Australia owed a duty of care to them not to supply product which they knew to be unsuitable for use in baby food formula pending further testing; not to make false representations to them about the suitability or safety of such products; and importantly, to correct any such representations when it subsequently became aware they were false. The same allegations are at the heart of the FTA and negligent misstatement claims in these proceedings.

[80] It would be open to the Danone claimants to include a breach of the FTA claims in the arbitration.[33] Further, even though the supply agreement and the arbitration is to be governed by English law, the claims under the New Zealand FTA can still be brought and determined in the arbitration.[34]

[81] The Danone plaintiffs argue FCGL is the proper defendant for the FTA claims because the relevant communications and assurances were given to Danone AP by people (such as Ms Thomas (now Ms Smith)) employed by FCGL. For present purposes I accept the claims are reasonably arguable on the basis that the relevant communications supporting the April assurances were by the people employed by FCGL. I also accept that the actions of FRDC can be attributed to FCGL.

[82] FCGL accepts that Ms Thomas and the other employees referred to were employed by it. Mr Galbraith submitted that the employment structure was unexceptional in that it was common in large corporations that operated within a group structure for one company within a group, either a services company or the group company, to employ all employees. He confirmed, however, that Fonterra and FCGL accepted that Fonterra was responsible for the actions of the employees, even if they were formally employed by FCGL.

[83] The employees' actions can properly be attributable to Fonterra. Fonterra accepts the relevant personnel were acting on its behalf in performance of Fonterra's obligations to Danone AP under the supply agreement, and on that basis Fonterra is bound by their actions even though they were employed by FCGL. For present purposes, I accept that either under agency or at least some form of vicarious liability arising from dual control both FCGL as employer, and Fonterra as the directing party, may be responsible for the employees', including Ms Thomas' actions.[35]

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33 *On Line International Ltd v On Line Ltd*, above n 7; *Reddy Dig Contractors Ltd v Connetics Ltd* HC Wellington CP147/02, 8 November 2002; *Sure Care Services Ltd v At Your Request Franchise Group Ltd* [2010] 3 NZLR 102 (HC) at [88]; cited in Williams & Kawharu et al, *Williams & Kawharu on Arbitration* (LexisNexis, Wellington 2011) at [7.3.8].

34 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* [1996] 39 NSWLR 160 at 164; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, (2006) 157 FCR 45; and Collins (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15 ed, vol 1, Sweet & Maxwell, 2012) at [32–008] and [32–016].

35 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510 at [77].

[84] I conclude that in principle there is no bar to the claims pursued by Danone AP in these proceedings being pursued against Fonterra in the arbitration. I also accept FCGL's argument that the Danone plaintiffs' FTA claims are derivative of Danone AP's claims against Fonterra.

The issue estoppel

[85] I turn to other relevant considerations. Mr Galbraith submitted the findings in the arbitration could create an issue estoppel binding on both the plaintiffs and FCGL (as a privy to Fonterra).[36] Mr Goddard countered by arguing that, in the absence of full and final pleadings and discovery it was not possible to say whether there will be an issue estoppel.

[86] I accept that usually the issue of whether an issue estoppel arises is determined once there have been findings in at least one of the proceedings in issue. However, given the nature of the issues in this case, I accept there is a distinct possibility of an issue estoppel arising. While both the arbitration and these proceedings are in their infancy I consider it possible to draw conclusions from the respective statements of claim as to the likelihood of overlap between the claims and the possibility of issue estoppel.

[87] The Danone entities are the same in both the arbitration and these proceedings (at least at present). They and FCGL would be bound by relevant findings in the arbitration in these proceedings as FCGL and Fonterra are likely to be regarded as privies. There is a sufficient nexus or mutuality of interest as between Fonterra and FCGL in relation to the issues raised in the arbitration and the current proceedings for them to be privies.

[88] In *Hamed Abdul Khaliq al Ghandi Co v New Zealand Dairy Board* the Court of Appeal suggested it was unreal to suggest that New Zealand Milk Products (NZMP) was a separate entity to the New Zealand Dairy Board (NZDB), other than in a strict legal sense as NZMP was an operating arm attached to the body of NZDB and subject to NZDB's direction. NZDB had a direct and continuing economic and

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[36] *Hamed Abdul Khaliq al Ghandi Co v New Zealand Dairy Board* (1999) 13 PRNZ 102 (CA).

financial interest in NZMP and particularly in relation to the litigation. There is a similar commonality of interest between FCGL and Fonterra. Fonterra was formerly NZMP and is a wholly owned subsidiary of FCGL. FCGL was formed from the merger of New Zealand Dairy Group and Kiwi Co-Operative Dairies together with NZDB.

[89] A related point is the practical risk of inconsistent findings of fact and law. Given the overlap of the factual background and the critical events, the arbitration panel and this Court will be required to make findings on a number of the same factual issues. There is a risk of inconsistent findings on major issues.

Costs

[90] There will be a duplication of witnesses, and evidence between the arbitration and these proceedings. Important witnesses for Fonterra on the report of 22 April and subsequent steps will be Ms Thomas (now Ms Smith), who managed the technical and quality aspects of Fonterra's supply of product to Danone AP under the supply agreement, Mr Frost who reported to Ms Thomas and Mr Gradon who led the commercial account manager's team at Fonterra. It is inevitable that their actions and the further tests conducted by FRDC will be under detailed scrutiny in both the arbitration and these proceedings. There will be an attendant impact of increased costs, both in terms of duplication of the time and expense of the proceedings and arbitration but also in terms of disruption to business.

Delay

[91] The arbitration is at a very preliminary stage. The third arbitrator is yet to be appointed. I accept that if these proceedings are stayed, then it will likely be at least two years before the arbitration is completed. It may be longer. That counts against a stay. But delay is not so much an issue in a case such as the present where the claim is for monetary compensation. The financial consequences of delay can be addressed by an award of interest at a realistic rate. I do not propose to make the stay on the precise terms sought. If the arbitration process is delayed by Fonterra, then the Danone plaintiffs can seek to have the stay lifted.

Commercial nature of the relationship

[92] Both parties are large corporate enterprises. Danone AP and Fonterra negotiated the detailed provisions of the supply contract including the submission to arbitration.[37] They intended that issues between them would be resolved by arbitration not by Court process. To the extent Danone AP says Fonterra's actions have caused it loss not caught by the arbitration clauses in the supply agreement, it is open for Danone AP to argue, as it has, in the arbitration, that the limitation clause should not apply.

Conclusion

[93] While I accept for present purposes that the Danone plaintiffs have arguable claims against FCGL (at least in relation to the first three causes of action), that is really no different to the *Goldman Sachs* case where Reichhold Norway had an arguable claim against Goldman Sachs. Nevertheless one of the reasons the proceedings were stayed was that Reichhold Norway also had a claim against J which it could pursue in the arbitration. Similarly in the present case, I consider Danone AP's claims in these proceedings could be pursued in the arbitration.

[94] Given the substantial degree of factual overlap between the claims in the Singaporean arbitration and these proceedings I consider that it would not be in the interests of justice for both claims to proceed in tandem. It is in the interests of cost, convenience and justice that the factual matters be determined first, either in these proceedings or the Singaporean arbitration. As noted previously, if the two were to proceed simultaneously there is a real risk of duplication in resources by the parties and inconsistent findings between the two. That would be both oppressive to FCGL and might, in the end, delay justice if differences in factual or legal findings were to form the basis of any subsequent appeal.

[95] To the extent there are issues not resolved in the arbitration, the Danone plaintiffs can pursue them once the arbitration is concluded. The stay is temporary, not permanent.

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[37] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at 353 per Lord Mustill.

[96] In my view the arbitration should go first because the parties agreed the arbitration process was to apply to claims arising out of the supply of product by Fonterra to Danone AP. The central dispute in this matter lies between Fonterra and Danone AP. The parties negotiated the terms of the supply agreement and provided for the consequences flowing from breach to be determined by arbitration. This dispute is the direct result of alleged failures by Fonterra in quality control in breach of the supply agreement. The tortious and statutory claims may not be derivative in a technical sense from the supply agreement but I am of the opinion that they are sufficiently connected so that it would be unrealistic to divorce them and determine the issues in tandem without reference to each other. Whether or not the Singaporean arbitration ultimately determines all the issues between the Danone and Fonterra interests, it will at the very least clarify the landscape for the remaining issues not caught by issue estoppel.

[97] For the above reasons I am satisfied that this is one of those rare and compelling cases where the circumstances require a stay. In coming to that decision I take into account the Danone plaintiffs' entitlement to vindicate their rights in a timely manner and to access the Court. However, that entitlement is subject to the Court's overriding control of its own proceedings to prevent abuse of process and to engage in sensible case management when the circumstances require. In this case, in my judgment, to require FCGL to respond to the allegations raised by the Danone plaintiffs would, in the circumstances where the claims arise out of the performance of the supply agreement by Fonterra, be oppressive to FCGL, unnecessarily duplicative and contrary to the interests of justice.

Result

[98] The application for stay is granted.

[99] However, as noted, I do not propose to make an order in the terms sought by FCGL. There will be an order staying this proceeding until further order of the Court, and expressly reserving leave for the Danone plaintiffs to seek to lift the stay in the event Fonterra delays the arbitration process.

Costs

[100] Costs to FCGL on a 3B basis plus disbursements as fixed by the Registrar.

[101] I certify for second counsel.

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Venning J